by either pleading or introducing evidentiary matter, and this is in accordance with the elementary principle that the burden of proof is ordinarily determined by the issues properly raised by the pleadings. *Mitchell* v. *Mitchell,* 18 Wkly. Note Cas. (Pa.) 439; *Shrader* v. *U. S. Glass Co.,* 179 Pa. 623; *Terryberry* v. *Woods,* 69 Vt. 94. In the principal case the incorrect pleading accentuated the difficulties of placing the "burden of proof". The defendant, besides setting up the ultimate fact of payment, also pleaded evidentiary matters, setting out the receipt and the letter acknowledging payment in full. The plaintiff in his reply, besides denying that the debt was in fact paid, which raised the real issue in the case, undertook to confess and avoid the evidentiary matter alleged by the defendant in support of the allegation of payment. But incorrectly pleading evidentiary matters could not properly affect the burden of proving the ultimate facts in issue in the case. The minority opinion fails to distinguish between substantial confession and avoidance of the ultimate fact of payment and a formal confession and avoidance of evidentiary matters improperly alleged in the answer in support of the defense.

INCOME TAX—INHERITANCE TAX PAID UNDER THE NEW YORK TRANSFER ACT IS NOT DEDUCTIBLE FROM NET INCOME IN COMPUTING INCOME TAX LIABILITY.—Plaintiff sued for the amount overpaid as income tax which should have been deducted from the amount of the entire tax, in case an inheritance tax paid on the estate inherited from her father is within the clause of the act of Congress providing that there shall be allowed as deductions from net income, "All national, state, county, school, and municipal taxes, * * *". *Held,* however, that a collateral inheritance tax levied under the laws of the state of New York is paid for the privilege of transmitting the property by will, and does not constitute such an item as is allowable as a deduction in the return of the beneficiary thereof. *Prentiss* v. *Eisner,* (June 16, 1920), 267 Fed. 16.

This application of the law of inheritance to the question of income tax returns brings up the entire subject of the nature of death duties. At common law no right to will real property existed, and, except as this result was achieved by means of uses, no such right was exercised until the STATUTE OF WILLS, (32 Henry VIII). Hence, this right was entirely statutory and subject to any restrictions that legislatures might see fit to impose. Thus all sorts of inheritance taxes,—legacy taxes, stamp duties, privilege taxes, have been generally regarded as taxes, not upon the corpus of the property that has been devised, but upon the right to transmit or receive the property by devise or will. *Knowlton* v. *Moore,* 178 U. S. 41, 20 Sup. Ct. 747; *State* v. *Dunlap,* 28 Idaho 784, 156 Pac. 1141; *In re Terry's Estate,* 218 N. Y. 218, 112 N. E. 931. For a general treatment see 33 L. R. A. (N. S.) 606. In the principal case the particular question is whether the tax is levied upon the power to transmit or upon the privilege to receive property by devise. If a tax upon the privilege to receive property by inheritance, then plaintiff, as recipient of the inheritance, has been taxed and should be able to claim an exemption, but if the tax is upon the power to transmit, then the tax has been

paid by the executor and plaintiff can claim no exemption. The principal case follows the decision of *United States* v. *Perkins*, 163 U. S. 625, 16 Sup. Ct. 1073, which, in translating a similar statute, decided that such a tax is not a levy upon property, but is strictly a tax upon the right to dispose of property by will. The reasoning of the decision is that the statute creates a lien upon the property at the moment of the testator's death, and the right of the legatee extends only to the property remaining after deducting the tax. *Matter of Penfold*, 216 N. Y. 163. That this is the more probable theory of "death duties" appears from the fact that it was the right to will rather than the right to receive by will that was granted by statute. In general, the statements of the courts imply that such taxes are upon the "right of succession" but the distinction of the present case has seldom been involved, so that the statements of the courts characterizing this right are nothing but *dicta*. *Corvin* v. *Baldwin*, 92 Conn. 99, 101 Atl. 834; *In re Cupple's Estate*, 199 S. W. 556; *Walker* v. *People*, —— Colo. ——, 171 Pac. 747. See also 33 L. R. A. (N. S.) 606. While the majority of the courts that really consider this point seem to support the principal case, *State* v. *Dunlap*, 28 Idaho 784, 156 Pac. 1141; *In re Terry's Estate*, 218 N. Y. 218, 112 N. E. 931; *In re Watson's Estate*, 174 N. Y. 191, a number of cases adopt an opposite theory. In cases involving legacy taxes in contradistinction to general inheritance taxes, the view is general that the legatee pays the tax rather than the executor, since any other view would require that all legacy taxes would have to be paid from the residual estate. *Matter of Gihon*, 169 N. Y. 443, 63 N. E. 561. *Corvin* v. *Baldwin*, 92 Conn. 99, 101 Atl. 834, implies a different view from that of the principal case in its intimation that jurisdiction of the court for the payment of general inheritance taxes may be secured by getting jurisdiction of the persons of the legatees. *Matter of Gihon*, 169 N. Y. 443, 63 N. E. 561, supports the view that the levy is upon the power to receive rather than upon the power to devise by will. The latest appearance of a doctrine contrary to the principal case is in *Henson* v. *Monday*, (Oct. 23, 1920), 224 S. W. 1042, in which the court takes the general stand that the nature of general inheritance taxes of this character is a levy upon the legatee's privilege to *receive* rather than a tax upon the power to *transmit*.

INSURANCE—ABSOLUTE PHYSICAL INABILITY NOT NECESSARY FOR "TOTAL DISABILITY."—It was stipulated in an accident insurance policy that for the loss of either foot by severance resulting from injury the defendant would pay a certain specified sum if the injury "shall independently and exclusively of other causes, immediately, wholly, and continuously disable and prevent the insured from performing any and every kind of duty pertaining to his occupation". The plaintiff sought a recovery for the loss of a foot the amputation of which was made necessary by an injury. He claimed compensation for a certain specified period on the ground of "total disability". The defendant resisted the claim on the ground that the plaintiff, during this certain period of alleged "total disability", was not "totally" disabled; that he had made two trips to New York where he "made an effort" to buy goods, assisted by his wife. His occupation was stated in the policy as "manager with office